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In The

Supreme Court of the United States

October Term, [redacted] 1970

[redacted]

277

R. L. TURNER, Warden,
Central Prison,

Petitioner,

vs.

JOHN A. LASSITER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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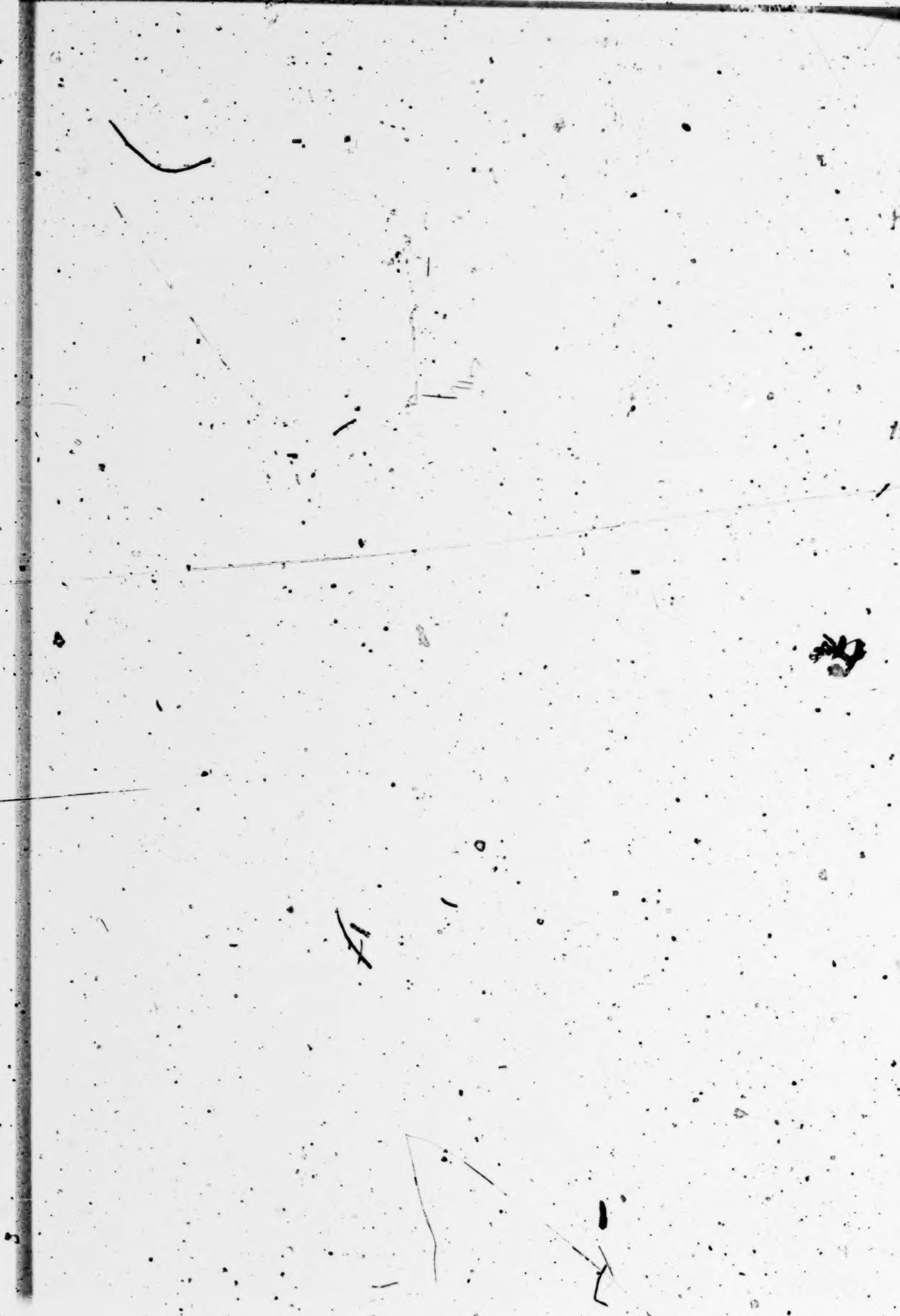

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In The

Supreme Court of the United States

October Term, 1969

R. L. TURNER, Warden,
Central Prison,

Petitioner,

vs.

JOHN A. LASSITER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Your petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the case of JOHN A. LASSITER, *vs.* R. L. TURNER entered on March 27, 1970.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is not yet reported and is printed as Appendix A to this Petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S. Code, Section 1254 (1).

QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS FOR THE FOURTH CIRCUIT ERR:

1. IN HOLDING THAT THE DECISION IN KLOPFER v. NORTH CAROLINA, 386 U.S. 213 (1967) IS TO BE GIVEN RETROACTIVE EFFECT.
2. IN VACATING AN OTHERWISE VALID PLEA OF GUILTY OF COMMON LAW ROBBERY ENTERED ON THE COMPETENT ADVICE OF COUNSEL.
3. IN DISREGARDING THE APPLICABILITY OF FEDERAL RULE OF CIVIL PROCEDURE 52 (a) TO THE DISTRICT COURT'S FINDINGS OF FACT AT THE HABEAS CORPUS HEARING.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Upon his plea of guilty, without the assistance of counsel, John A. Lassiter was convicted of armed robbery at the April 1960 Term of the Superior Court of Hertford County, North Carolina, and was sentenced to a term of eighteen (18) to twenty (20) years imprisonment. A charge of secret assault, which was the subject of a related indictment was nolle prossed.

In State post-conviction proceedings held at the April 1965

1. See KLOPFER v. STATE OF NORTH CAROLINA, 386 U.S. 213 (1967) for a

Session of the Superior Court of Hertford County, the 1960 conviction for armed robbery was vacated because of Lassiter's lack of counsel at the original trial. Thereafter, this case was set for retrial and L. Frank Burleson, Esquire, was appointed to represent Lassiter. He was retried at the July 1965 Session of the Superior Court of Hertford County and upon a plea of guilty to common law robbery[2] was sentenced to eight (8) to ten (10) years imprisonment. Prior to accepting the plea to common law robbery, the Honorable J. William Copeland, Judge Presiding, extensively interrogated Lassiter under oath as to whether or not he understood the nature and consequences of his plea of guilty, what the Court could do and as to whether or not he was satisfied with the services provided by his court-appointed counsel and whether or not he had authorized his attorney to enter the plea of guilty on his behalf. The complete transcript of Lassiter's interrogation by the Court prior to accepting the plea of guilty to common law robbery is incorporated in the State post-conviction judgment which is reprinted as Appendix C to this Petition.

Lassiter subsequently filed a Petition for a Post-Conviction Hearing pursuant to the North Carolina Post-Conviction Hearing Act, N.C.G.S. 15-217 et seq., contending that his plea of guilty to common law robbery should be vacated because it was obtained by coercion on the part of the State, through a statement made by the Solicitor, the Honorable W.H.S. Burgwyn, Jr., to L. Frank Burleson, Esquire, Lassiter's court-appointed counsel, that he was contemplating re-opening a charge of secret assault which had been nolle prossed at Lassiter's original armed robbery trial. Lassiter was provided an evidentiary hearing with the assistance of court-appointed counsel, Carter Jones, Esquire, before the Honorable Walter W. Cohoon, Judge Presiding, and on February 25, 1966, Judge Cohoon entered an extensive judgment denying post-conviction

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2. The crime of common law robbery is a lesser-included offense of the crime of armed robbery for which Lassiter was originally tried. STATE v. STEWART, 253 N.C. 371, 132 S.E. 2d 355, (1961).

NORTH CAROLINA, 386 U. S. 213 (1967), to be retroactively applied, and therefore the Court should [illegible] by [illegible] that a threat by a prosecutor to do what the law will not permit, or if not to do is determined [illegible] the impossibility, [illegible] the plea invalid. In this circumstance, the representation takes on the character of a [illegible] an offense impairing the plea, even though the prosecutor is also aware of the forbidden character. It is not the threat that is discovered in making the plea and the deception prevents his act from being a true act of volition."

REASONS FOR GRANTING THE WRIT

1. The decision of the United States Court of Appeals for the Fourth Circuit that KLOPFER v. NORTH CAROLINA, supra, is entitled to be retroactively applied does not mesh with

the rules of the opinion on the determination of retroactivity of a newly announced constitutional doctrine.

2. The decision of the United States Court of Appeals for the Fourth Circuit in this case, in setting aside an otherwise valid plea of guilty, is in conflict with the standards announced by this Court in McMANN v. RICHARDSON, 397 U. S. 759 (1970).

3. The decision of the United States Court of Appeals for the Fourth Circuit in this case disregards the applicability of Federal Rule of Civil Procedure 52 (a) to the District Court's Findings of Fact on the evidentiary hearing Lassiter was provided in the District Court.

In determining the retroactivity of newly announced constitutional rules, two underlying issues are presented:

1. Does the new rule affect the very integrity of the fact finding process?

2. Does the new rule avert "a clear danger of convicting the innocent"? STOVALL v. DENNO, 388 U. S. 293 (1967); JOHNSON v. NEW JERSEY, 384 U. S. 719 (1966).

"The criteria guiding resolution of the question implicates (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." STOVALL v. DENNO, supra, at 297.

Retroactive application of recently announced constitutional safeguards to the criminally accused is not a matter of course. LINKLETTER v. WALKER, 381 U. S. 618 (1964) (exclusionary rule of illegally seized evidence under MAPP v. OHIO, 367 U. S. 643 (1961), held inapplicable to convictions which had become final before MAPP was decided); TEHAN v. SHOTT, 382 U. S. 406 (1966) (rule of GRIFFIN v. CALIFORNIA, 380

U.S. 609 (1965) (declaring comment on refusal of the defendant to testify unconstitutional held inapplicable to cases in which judgment of conviction was rendered, availability of appeal exhausted, and the time for petition for Certiorari lapsed or was denied before GRIFFIN was decided); JOHNSON v. NEW JERSEY, 384 U.S. 719 (1966) (exclusionary rules of ESCOBEDO v. ILLINOIS, 378 U.S. 478 (1964), and of MIRANDA v. ARIZONA, 384 U.S. 436 (1966), held applicable only to cases where the trials have commenced after the respective decisions were announced); STOVALL v. DENNO, 388 U.S. 293 (1967) (rules of UNITED STATES v. WADE, 388 U.S. 218 (1967), and of GILBERT v. CALIFORNIA, 388 U.S. 263 (1967), insuring right to counsel at identification line-ups, held applicable only to cases involving confrontations taking place after STOVALL); DeSTEFANO v. WOODS, 392 U.S. 631 (1968) (DUNCAN v. LOUISIANA, 391 U.S. 145 (1968), right to a jury trial in serious State criminal cases and BLOOM v. ILLINOIS, 391 U.S. 194 (1968), right to jury trial for serious criminal contempts, held applicable only to trials commencing before the respective cases were decided); FULLER v. ALASKA, 393 U.S. 80 (1968) (LEE v. FLORIDA, 392 U.S. 378 (1968), holding evidence violative of § 605 of the Federal Communications Act, is to be applied only to trials in which the evidence is sought to be introduced after the date of LEE); DESIST v. UNITED STATES, 394 U.S. 244 (1969) (exclusionary rule of KATZ v. UNITED STATES, 389 U.S. 347 (1967) held applicable only to cases in which the prosecution seeks to introduce fruits of an electronic surveillance conducted after KATZ was decided).

It is submitted that the primary purpose of the constitutional right to a speedy trial is the regulation of the conduct of judicial officials as opposed to preventing the conviction of innocent people. Violations of this right do not *per se* impinge or infect the truth determining process as to render impossible a fair trial. It is intended to promote promptness on the part of judicial officials in the exercise of their duties and provide

the accused an opportunity to clear his name as soon as possible. As a result, violations of this right to a speedy trial in the past did not cause unfair trials in a sense that innocent people were unconstitutionally convicted. For these reasons, the rule announced in KLOPFER should not be retroactively applied.

The evil at which KLOPFER is directed does not exist in this case. The "nolle pros" taken by the Solicitor in 1960 with respect to the charge of secret assault against Lassiter, was not objected to by him. In KLOPFER the accused objected to having his case "nolle prossed" whereas in this case the Fourth Circuit candidly admits that ". . . We have no doubt that in 1960 Lassiter did not object to the suspension of the secret assault prosecution. . . ." Nowhere in the record does it appear that Lassiter asserted the right to clear his name of this charge of secret assault. His objection is that the Solicitor contemplated obtaining the Court's permission to re-instate the prosecution. Such an objection does not involve a denial of a speedy trial—the right that KLOPFER protects. Therefore, it is submitted that KLOPFER is not applicable to the facts of this case.

Lassiter's re-trial on the charge of armed robbery began on July 27, 1965, and was recessed when the venire of prospective jurors was exhausted before a jury was selected. At the plenary hearing held in the United States District Court for the Eastern District of North Carolina before Chief Judge Algernon L. Butler, L. Frank Burleson, Jr., Esquire, Lassiter's court-appointed trial counsel, testified in response to questions by the Court:

> "Q. . . . Did the Solicitor, Mr. Burgwyn, indicate to you whether or not the secret assault charge would not be resuscitated?
>
> "A. You mean re-opened, revived?
>
> "Q. Re-opened, revived, if the petitioner pled guilty to the lesser offense of common law robbery?

course nothing that he said or did gave me that impression, but I am sure, and I will have to say to be fair to everyone concerned. I'm sure that in my own notes that I had that thought in my mind." (T. pp. 80-82).

The Court, after hearing Federal habeas relief, so further found:

"3. Before leaving the courtroom, the prosecuting attorney hereinafter referred to as Solicitor told defense counsel he was contemplating preparing a charge of secret assault which had been *nolle prossed* at Petitioner's original armed robbery trial.

"4. In response to the Solicitor's statement, defense counsel asked the Solicitor whether he would accept a plea of guilty to a lesser included offense. The Solicitor indicated he would consider counsel's proposal.

"5. That evening defense counsel discussed the *nolle prossed* charge with Lassiter. He told Petitioner he did not know whether state law permitted the Solicitor to reopen the secret assault charge but that he would research the matter and advise him the following morning. He further told Lassiter to reconsider entering a plea of guilty to a lesser included offense in the event the Solicitor could reinstate the charge.

"6. The next morning defense counsel advised Lassiter that the *nolle prossed* charge could be reinstated and discussed the alternative courses open to Petitioner. He advised Lassiter that if he pleaded not guilty to armed robbery, and if he was acquitted of that charge, the secret assault charge probably would be reopened; however, if he changed his plea to guilty to common law robbery, the *nolle prossed* charge probably would not be reinstated and he could receive a maximum of ten (10) years imprison-

frequently involves the making of difficult judgments . . . a decision to plead guilty must necessarily rest upon counsel's answers, uncertain as they may be. Waiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts. . . .

"That a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing . . .

"In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the grounds that counsel may have misjudged the admissibility of the defendant's confession. Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously though admissible in evidence depends as an initial matter not on whether the court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases . . .

* * *

"What is at stake in this phase of the cases is not the integrity of the state convictions obtained on guilty pleas, but whether, years later, defendants must be permitted to withdraw their pleas, which were perfectly valid when made, and be given another choice between admitting their

6. By way of analogy, the District Court found:

"5. That evening defense counsel discussed the *nolle prossed* charge with Lassiter. He told Petitioner he did not know whether state law permitted the Solicitor to reopen the second assault charge, but that he would research the matter and advise him the following morning. He further told Lassiter to consider entering a plea of guilty to a lesser included offense in the event the Solicitor could reinstate the charge.

"6. The next morning defense counsel advised Lassiter that the *nolle prossed* charge could be reinstated and discussed the alternative courses open to Petitioner . . ."

guilt and putting the State to its proof . . . This would be an improvident invasion of the State's interest in maintaining the finality of guilty plea convictions which were valid under constitutional standards applicable at the time. It is no denigration of the right to trial to hold that when the defendant waives his State court remedies and admits his guilt, he does so under the law then existing; further, he assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts. Although he might have pleaded differently had later decided cases then been the law, he is bound by his plea and his conviction unless he can allege and prove serious derelictions on the part of counsel sufficient to show that his plea was not, after all, a knowing and intelligent act."

In the same vein, Mr. Justice White, in delivering the Opinion of this Court in PARKER v. NORTH CAROLINA, U.S. (1970) stated:

". . . even if PARKER's counsel was wrong in his assessment of PARKER'S confession, it does not follow that his error was sufficient to render the plea unintelligent and entitle PARKER to disavow his admission in open court that he committed the offense with which he was charged. Based on the facts of record relating to PARKER'S confession and guilty plea, which we have previously detailed, we think the advice he received was well in the range of competence required of attorneys representing defendants in criminal cases. PARKER'S plea of guilty was an intelligent plea not open to attack on the grounds that counsel misjudged the admissibility of PARKER'S confession."

Finally, as Mr. Justice White stated, in delivering the Opinion of this Court, in BRADY v. UNITED STATES, U.S. (1970):

". . . We decline to hold, however, that a guilty plea is

compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged."

CONCLUSION

The decision of the Fourth Circuit in the application of the KLOPFER doctrine in this case extends well beyond the intent of this Court. (1) In holding KLOPFER to be retroactive; (2) In applying KLOPFER to the facts of this case; and (3) In utilizing KLOPFER as a basis for setting aside an otherwise valid plea of guilty. Therefore, it is respectfully submitted that this Court exercise its jurisdiction in granting the Writ of Certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit in this case.

Respectfully submitted,

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Appendix A

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 12,274

John A. Lassiter,

Appellant,

versus

R. L. Turner, Warden, Central Prison,

Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina.
Algernon L. Butler, Chief Judge.

(Argued December 5, 1969 Decided March 27, 1970.)

Before BRYAN, WINTER and BUTZNER, Circuit Judges.

Martin N. Erwin, Court-assigned counsel (Smith, Moore, Smith, Schell & Hunter on brief) for Appellant, and Dale Shepherd, Staff Attorney, Office of the Attorney General of North Carolina (Robert Morgan, Attorney General of North Carolina, and Jacob L. Safron, Staff Attorney, Office of the Attorney General of North Carolina, on brief), for Appellee.

WINTER, Circuit Judge:

This appeal raises the question of whether a prosecutor's threat to revive a related prosecution, nolle prossed five years

before, deprives a guilty plea of its voluntary character where the plea was substantially motivated by the threat. The district judge concluded that the voluntariness of the plea was unaffected, and he refused habeas corpus. We conclude to the contrary and direct that the writ issue.

—I—

Upon his plea of guilty, John A. Lassiter was convicted of armed robbery at the April, 1960, Term of the Superior Court of Hertford County, North Carolina. He was sentenced to a term of eighteen to twenty years imprisonment. A charge of secret assault which was the subject of a related indictment was nolle prossed.[1]

In state post-conviction proceedings, the judgment on the conviction of armed robbery was set aside because Lassiter had not been represented by counsel. Thereafter this case was set for retrial and counsel was appointed to represent him.

The record supports the findings of the district judge who found first that court-assigned counsel was of the opinion that the charge of armed robbery was defensible and that he entered a not guilty plea on Lassiter's behalf. The trial began in July, 1965, but was recessed on the first day when the venire of prospective jurors was exhausted before a jury was selected. The district judge's additional findings state what next transpired:

> "3. Before leaving the courtroom, the prosecuting attorney (hereinafter referred to as Solicitor) told defense counsel he was contemplating reopening a charge of secret assault which had been *nolle prossed* at Petitioner's original armed robbery trial.

1. This aspect of North Carolina's criminal procedure was explained in *State v. Klopfer*, 266 N. C. 349, 345 S. E. 2d 909 (1966), and *Klopfer v. North Carolina*, 386 U. S. 213 (1967). From the docket entry in the instant case, we understand that the secret assault charge against Lassiter could be restored to the trial docket only on order of the judge upon the Solicitor's (prosecutor's) application.

4. In response to the Solicitor's statement defense counsel asked the Solicitor whether he would accept a plea of guilty to a lesser included offense. The Solicitor indicated he would consider counsel's proposal.

5. That evening defense counsel discussed the *nolle prossed* charge with Lassiter. He told Petitioner he did not know whether state law permitted the Solicitor to reopen the secret assault charge, but that he would research the matter and advise him the following morning. He further told Lassiter to consider entering a plea of guilty to a lesser included offense in the event the Solicitor could reinstate the charge.

6. The next morning defense counsel advised Lassiter that the *nolle prossed* charge could be reinstated and discussed the alternative courses open to Petitioner. He advised Lassiter that if he pleaded not guilty to armed robbery, and if he was acquitted of that charge, the secret assault charge probably would be reopened; however, if he changed his plea to guilty to common law robbery, the *nolle prossed* charge probably would not be reinstated and he could receive a maximum of ten years imprisonment, and he would be eligible for parole in two and one-half years.

7. After consulting members of his family Lassiter decided to change his plea from not guilty of armed robbery to guilty of common law robbery.

8. Petitioner in open court stated to the trial judge that he had authorized his attorney to tender a plea of guilty of common law robbery. Petitioner also informed the trial judge that his plea was voluntary.[2]

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2. Lassiter told the trial judge that his plea was voluntary. However, the evidence shows that, after the plea bargain was struck, counsel advised Lassiter that he must testify that his plea was voluntary in order to have it accepted by the court. Moreover, Lassiter's statement that the plea was voluntary was made with the understanding that he could be tried for secret assault.

9. Petitioner has not been tried on the secret assault charge." District judge's footnote eliminated.

The district judge made no specific finding of Lassiter's motivation in tendering the guilty plea to the lesser included offense of common law robbery. However, his other findings lead us to conclude that the threat of reopening of the secret assault charge was the reason.

Lassiter pressed his claim in the state courts that his plea was involuntary because of the Solicitor's statement that he contemplated reopening the secret assault charge. He was granted an evidentiary hearing in the Hertford County Superior Court but relief was denied. His application for certiorari to the Supreme Court of North Carolina was denied on June 16, 1966. Thus, available state remedies have been exhausted. Because the state court findings were incomplete with regard to his claim, Lassiter was granted a plenary hearing in the district court. There, he also raised a question of sentence credit. The district judge did not consider this question because of Lassiter's failure to present it to the state courts. We do not reach it because of our overall disposition of the appeal.

— II —

Plea bargaining is well established in the administration of criminal justice. Properly conducted and fairly negotiated, plea bargaining serves a useful purpose for society, the prisoner and the quality of justice in those cases which must be tried. *United States v. Williams*, 407 F.2d 940, 948 (4 Cir. 1969); *Wood v. North Carolina*, 405 F.2d 349, 350 (4 Cir. 1968) (Haynsworth, C.J., dissenting); Am. Bar Asso. Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty (Tent. Draft 1967) pps. 3; 10-11; 60-66; President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (1967) pp. 134-136. In addition to other safeguards which limit the character of the negotiations and the subsequent agreement, an overriding constitutional limitation is that the plea must not have been induced by promises or threats which deprive it of the character

of a voluntary act. *Machibroda v. United States*, 368 U. S. 487, 493 (1962). When the plea is tendered to a lesser included offense, this limitation is as applicable as when it is tendered to the more aggravated offense charged.

The types of promises or threats which deprive a plea of its voluntary character are not susceptible of comprehensive definition so that no one statement of the definition immediately delineates that which is proscribed. The cases which have held confessions involuntary reflect that proscribed threats, inducements and promises may be obvious, such as physical harm, or they may be more subtle, overbearing devices causing an accused to surrender his right not to incriminate himself. In considering the voluntary character of pleas of guilty, we must be no less alert to recognize the subtle devices which overbear an accused's will because the entry of a plea of guilty constitutes a waiver of several constitutional rights. A plea of guilty constitutes a waiver of the right to trial and the right of confrontation, in addition to a waiver of the privilege against self-incrimination. *Boykin v. Alabama*, 395 U. S. 238 (1969); *McCarthy v. United States*, 394 U. S. 459 (1969).

We do not attempt to define every instance in which a promise or inducement which affects a guilty plea is permissible or is proscribed. But we have no difficulty in concluding that a threat by a prosecutor to do what the law will not permit, if it motivates a defendant ignorant of the impossibility, renders the plea involuntary. In such a circumstance, the representation takes on the character of a trick or an artifice inducing the plea, even though the prosecutor is also unaware of its forbidden character. In effect, the defendant is deceived into making the plea, and the deception prevents his act from being a true act of volition. *Cf. McCarthy v. United States*, *supra*; *Anderson v. Turner*, 379 F. 2d 46 (1 Cir. 1967).

We turn to a consideration whether a revival of the charge of secret assault was permitted under state or federal law.

— III —

In *State v. Johnson*, 275 N. C. 264, 167 S.E.2d 274 (1969), the Supreme Court of North Carolina summarized North Carolina law with regard to the right to a speedy trial. It said:

> "The fundamental law of the State secures to every person *formally accused* of crime the right to a speedy and impartial trial, as does the Sixth Amendment to the Federal Constitution made applicable to the State by the Fourteenth Amendment. Klopfer v. North Carolina, 386 U. S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967)."

167 S.E.2d 277-78. So far as this statement was a pronouncement of state organic law, it represented nothing new or novel. The North Carolina rule existed prior to the decision in *Johnson*. *State v. Lowry*, 263 N. C. 536, 139 S.E.2d 870 (1965); *State v. Patton*, 260 N. C. 359, 132 S.E.2d 891 (1963).

Precisely when under the North Carolina law in the course of a prosecution, the right to a speedy trial has been denied cannot be stated with certainty. "No general principle fixes the exact time within which a trial must be had. Whether a speedy trial is afforded must be determined in the light of the circumstances of each particular case." *State v. Lowry*, *supra*, 139 S.E.2d 870, 875. In *State v. Johnson*, *supra*, the claimed denial of a speedy trial arose from a delay of four years in obtaining an indictment after a formal charge was entered and an arrest warrant issued but not formally served. The Court said that the test of whether a speedy trial had been denied in that case was "the same as in a case where the delay occurred after indictment. The Court's statement of the test and of the appropriate relief is relevant here:

> "We here hold that when there has been an atypical delay in issuing a warrant or in securing an indictment and defendant shows (1) that the prosecution deliberately and unnecessarily caused the delay for the convenience or supposed advantage of the State; and (2) that the length of

> the delay created a reasonable possibility of prejudice, defendant has been denied his right to a speedy trial and the prosecution must be dismissed."

167 S.E.2d at 283.

In Lassiter's case there can be no question but that any delay in the trial of the secret assault charge was at the instance of the prosecutor. It was the prosecution which requested an indefinite delay in the first instance and it was the prosecution which permitted the lapse of five years between the indictment and the statement of intention conditionally to revive it. The prosecution understandably may have concluded that the state's interests were fully served by the substantial sentence meted out on the conviction of armed robbery so that there was no useful purpose in trying the secret assault case. The first part of the test for determining the denial of a speedy trial under North Carolina law was clearly met.

The second part of the test is more troublesome to apply to Lassister's case. The record does not reflect facts like those in *Johnson* from which we can speculate as to actual or threatened prejudice to Lassiter. However, the passage of five years gives rise to the likelihood that witnesses will be dispersed, and memories dimmed. It alone is enough to create "a reasonable possibility of prejudice." In *Johnson* the passage of time was four years, and the Court concluded that the right was denied. *United States v. Lustman*, 258 F.2d 475 (2 Cir. 1958), *cert. den.*, 358 U. S. 880 (1958), cited in *Johnson* to support the statement "[a] delay of four years in securing an indictment is, nothing else appearing, an unusual and an undue delay." 167 S.E.2d at 283. In *Lustman*, like Lassiter's case, the delay was in excess of five years. *Lustman*, in accord with the weight of other federal authority cited therein, stated that such a delay constituted the denial of the right to a speedy trial, without the need for showing prejudice to the accused. We conclude that North Carolina's requirement of "a reasonable possibility of prejudice" is met by the probable results of the lapse of such a substantial period.

Thus, under North Carolina law, Lassiter's right to a speedy trial on the secret assault charge had been denied him, and he would be entitled to its dismissal. We have no need to consider the retroactivity of the North Carolina rule, because it was as stated at the time that Lassiter tendered his guilty plea. Since Lassiter's guilty plea was motivated by a misrepresentation of possible consequences under North Carolina law, his plea lost its voluntary character.

— IV —

We reach the same conclusion when we consider Lassiter's Sixth Amendment protection under federal law.

In *Klopfer v. North Carolina*, 386 U. S. 213 (1967), the Supreme Court condemned the North Carolina practice of "nolle prosequi with leave" as denying the Sixth Amendment right, made applicable to the states through the Fourteenth Amendment, to a speedy trial.[3] Although in *Klopfer* the nolle prosequi was with leave, we do not read the scope of the holding to be limited to this type of disposition. Under North Carolina law, a nolle prosequi, not with leave, does not terminate the prosecution. It may be reopened with the court's permission. The possibility that permission may be granted at some future date generates the same invidious consequences that led to the *Klopfer* decision.

In *Klopfer* the accused objected to having his case shelved. We have no doubt that in 1960 Lassiter did not object to the suspension of the secret assault prosecution. This is not to say, however, that there was a waiver of the right to a speedy trial. There is no evidence that he knew of his right to a speedy trial

3. The essence of the decision appears from the following extract from the opinion: "The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes. By indefinitely prolonging this oppression, as well as the 'anxiety and concern accompanying public accusation,' the criminal procedure condoned in this case by the Supreme Court of North Carolina clearly denies the petitioner the right to a speedy trial which we hold is guaranteed to him by the Sixth Amendment of the Constitution of the United States." *Klopfer v. North Carolina*, 386 U. S. at 222.

or that he intended to relinquish it. *Klopfer* held that the right guaranteed by the Sixth Amendment extends, through the Fourteenth Amendment to persons accused under state law. If the 1967 *Klopfer* decision is retrospective in effect, Lassiter could not, as a matter of federal constitutional law, have been tried in 1965 on the 1960 secret assault charge. If it is retrospective, his guilty plea to common law robbery was motivated by a misrepresentation of the true alternatives, so that the plea was involuntary.

North Carolina argues that since *Klopfer* was decided after Lassiter's plea, that decision may not be invoked to invalidate the plea.

Stovall v. Denno, 388 U. S. 293 (1967), and *De Stefano v. Woods*, 392 U.S. 631 (1968), are the controlling authorities on the question of retroactivity of constitutional rules of criminal procedure. The factors to be considered, as stated in *Stovall* and repeated in *De Stefano*, are three: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." 388 U. S. at 297; 392 U. S. at 633. A consideration of these factors leads us to conclude that *Klopfer* should be applied retroactively.

Klopfer states that the purpose of applying the Sixth Amendment right to a speedy trial is to avoid "indefinitely prolonging *** oppression, as well as the 'anxiety and concern accompanying public accusation.'" 386 U. S. at 222. Another purpose is the prevention of increased difficulty in defense of state charges. *United States v. Ewell*, 383 U. S. 116 (1966), cited in *Klopfer*, 386 U. S. at 222 n. 6. The Sixth Amendment right to a speedy trial is particularly concerned with the fairness of the fact-finding process to determine guilt or innocene. There is involved a more important consideration than a prophylactic rule to require prosecutors to comply strictly with a rule of criminal procedure. Moreover, where *Klopfer* is applicable in

the context of the voluntariness of a plea of guilty, many other constitutional rights are at issue. A plea of guilty includes, at least, a waiver of the right not to incriminate one's self, the right to a trial by jury, the right of confrontation, and the right of cross-examination, and some of these have been held to have retrospective application. *Pointer v. Texas*, 380 U. S. 400 (1965); *Barber v. Page*, 390 U. S. 719 (1968); *Brookhart v. Janis*, 384 U. S. 1 (1966); *Berger v. California*, 393 U. S. 314 (1969). Where the end product of applying *Klopfer* is the conclusion that the guilty plea was involuntary, the rule that retroactively excludes the use of coerced confessions becomes analogous. *Jackson v. Denno*, 378 U. S. 368 (1964).

Klopfer did not represent such a substantial departure from existing law that either prior reliance or the potential impact upon the administration of justice requires only prospective application. In *Klopfer* there was an exhaustive analysis of the law and practice in other jurisdictions from which we conclude that there was little reliance on an asserted right to reinstate a nolle prossed indictment at an indefinite future date, and further that the impact of declaring that no such right exists would be slight. Specifically, the Court stated that the argument that the right to a speedy trial does not afford affirmative protection against an unjustified postponement of trial "has been explicitly rejected by every other state court [other than North Carolina] which has considered the question" (386 U. S. at 219); that "[t]hat conclusion has been implicitly rejected by the numerous courts which have held that a nolle prossed indictment may not be reinstated at a subsequent term" (386 U. S. at 219-220); and that "each of the fifty states guarantees the right to a speedy trial to a citizen" (386 U. S. at 226). More significantly, the Court found that of the thirty states which permit a prosecuting official to enter a nolle pros, thirteen proscribe the reinstatement of the indictment at a subsequent term. Several permit reinstatement at an indefinite future term only when the defendant has consented or cannot be brought before the court. "[O]f the remaining States, only

North Carolina and Pennsylvania have held that a nol prossed indictment could be reinstated at a future term." 386 U. S. at 220 n. 5.

Applying *Stovall* and *De Stefano*, we hold that *Klopfer* may be applied retroactively and may be applied by us in this case to render Lassiter's 1965 plea to common law robbery involuntary. All of the *Stovall* and *De Stefano* considerations weigh in favor of the retroactivity of *Klopfer*. We conclude that the plea was involuntary under federal standards because it was induced by a consideration illegal under both state and federal law.

—V—

The district judge should issue the writ, affording the state the opportunity to retry Lassiter on the charge still pending.

REVERSED and REMANDED

Albert V. Bryan, Circuit Judge, concurring:

I join in the result of the opinion because it is fully supported by the State law, but I see no justification for a determination that *Klopfer*, 386 US 213, is retroactive. The latter is but an obiter addendum to a clear and admirable exposition of the case.

I do not now imply any view on the right or wrong of its enunciations upon *Klopfer*. For me, it is unwise to decide when decision is not required. Only for that reason do I dissociate myself with this portion of the opinion.

Retrospectiveness of a Supreme Court pronouncement, as much litigation has demonstrated, is not an uncomplicated Constitutional problem. See, e.g., Desist v. United States, 394 US 244 (1969); Stovall v. Denno, 388 US 293 (1967); Linkletter v. Walker, 381 US 618 (1965). Its resolution should await the necessity and not, as now, be answered by anticipation.

When State law unequivocally warrants a decision, as we

unanimously now hold, the Supreme Court, unlike our course here, declines to reach Constitutional or other Federal grounds for sustenance. See, e.g., Jankovich v. Indiana Toll Road Comm'n, 379 US 487, 489 (1965); Fox Film Corp. v. Muller, 296 US 207, 211 (1935); cf. Henry v. Mississippi, 379 US 443 (1965); Fay v. Noia, 372 US 391 (1963). This is precedent worthy to be followed presently.

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

CIVIL — NO. 1931

JOHN A. LASSITER)
Petitioner,)
v.)
) OPINION AND ORDER
R. L. TURNER, Warden,)
Central Prison)
Respondent.)

This is an application by John A. Lassiter, a state prisoner, for a writ of habeas corpus in forma pauperis. Lassiter was convicted of armed robbery at the April 1960 Term of the Superior Court of Hertford County and was sentenced to a term of eighteen to twenty years imprisonment. At the April 1965 Session of the Superior Court of Hertford County his conviction was vacated in post conviction proceedings pursuant to N. C. Gen. Stats. § 15-222.[2] He was retried at the July 1965 Session of the Superior Court of Hertford County and upon a plea of guilty to common law robbery[1] was sentenced to eight to ten years imprisonment.

Petitioner attacks his common law robbery conviction and his sentence of eight to ten years on the grounds that (1) his plea of guilty at his second trial was coerced by the prosecuting attorney's statement of intention to try him on charges previously *nolle prossed*, (2) that his counsel communicated the prosecutor's statement to him resulting in his plea of guilty, and (3) he was unconstitutionally denied credit on the new sentence for the amount of time served under the vacated sentence.

1. The crime of common law robbery is a lesser included offense of the crime for which petitioner was originally tried. State v. Stewart, 255 N. C. 571, 122 S. E. 2d 355 (1961).

Lassiter presented contentions (1) and (2) to the February, 1966 Session of the Superior Court of Hertford County in a post-conviction proceeding, but did not allege ground (3) for the reason that "petitioner felt that as the State Court gave him the sentence they would not consider it excessive". Certiorari was denied by the Supreme Court of North Carolina on June 16, 1966.

In support of the allegation that his guilty plea was coerced, Lassiter testified at the State post-conviction hearing that he was induced to plead guilty by the prosecuting attorney's statement that unless he pleaded guilty to the lesser offense of common law robbery he would be prosecuted not only for armed robbery, but also on a charge of secret assault which had been *nolle prossed* at his original trial. Court assigned counsel corroborated Lassiter's testimony. The prosecuting attorney testified he made no promise to petitioner or to his attorney.

In the order denying post-conviction relief the State Court failed to find any facts relative to Lassiter's testimony that the prosecuting attorney had expressed an intention to reinstate the secret assault charge. Desirous of exploring the matter further, we appointed counsel and conducted an evidentiary hearing. From the evidence there offered we make the following findings of fact:

1. Prior to Petitioner's retrial, court-assigned counsel, after preparation of his defense, was of the opinion that the State of North Carolina did not have sufficient competent evidence to support a verdict of guilty of armed robbery, and with the knowledge and consent of Petitioner a plea of not guilty to the charge of armed robbery was entered in Petitioner's behalf.

2. After entry of the not guilty plea, counsel began the selection of a jury, but court was recessed for the day when the venire of prospective jurors was exhausted.

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2. See Klopfer v. State of North Carolina, 386 U.S. 213, 87 Sup. Ct. 988 (1967), for a discussion of North Carolina's procedural device known as *"nolle prosequi"*.

3. Before leaving the courtroom, the prosecuting attorney (hereinafter referred to as Solicitor) told defense counsel he was contemplating reopening a charge of secret assault which had been *nolle prossed* at Petitioner's original armed robbery trial.

4. In response to the Solicitor's statement defense counsel asked the Solicitor whether he would accept a plea of guilty to a lesser included offense. The Solicitor indicated he would consider counsel's proposal.

5. That evening defense counsel discussed the *nolle prossed* charge with Lassiter. He told Petitioner he did not know whether state law permitted the Solicitor to reopen the secret assault charge, but that he would research the matter and advise him the following morning. He further told Lassiter to consider entering a plea of guilty to a lesser included offense in the event the Solicitor could reinstate the charge.

6. The next morning defense counsel advised Lassiter that the *nolle prossed* charge could be reinstated and discussed the alternative courses open to Petitioner. He advised Lassiter that if he pleaded not guilty to armed robbery, and if he was acquitted of that charge, the secret assault charge probably would be reopened; however, if he changed his plea to guilty to common law robbery, the *nolle prossed* charge probably would not be reinstated and he could receive a maximum of ten years imprisonment, and he would be eligible for parole in two and one-half years.[3]

7. After consulting members of his family Lassiter decided to change his plea from not guilty of armed robbery to guilty of common law robbery.

8. Petitioner in open court stated to the trial judge that he had authorized his attorney to tender a plea of guilty of com-

[3] "All prisoners, except those serving a life sentence, shall be eligible to have their case considered for parole when they have served a fourth of their sentence, if their sentence is determinate, and a fourth of their minimum sentence, if their sentence is indeterminate . . . ." N.C. Gen. Stat. § 148-58.

mon law robbery. Petitioner also informed the trial judge that his plea was voluntary.

9. Petitioner has not been tried on the secret assault charge.

THE PLEA

"A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. A conviction based upon such a plea is open to collateral attack." Machibroda v. United States, 368 U. S. 487, 493, 82 Sup. Ct. 510, 513 (1962); See, White v. Pepersack, 352 F. 2d 470 (4 Cir. 1965). However, not every act or statement by a prosecutor which influences an accused to enter a guilty plea renders the plea involuntary. Brown v. Beto, 377 F. 2d 950 (5 Cir. 1967). Properly conducted plea negotiations are "an essential, inevitable, and not improper part of the criminal process", although otherwise lawful plea discussions between prosecutor and defense counsel may be abused to such an extent as to vitiate a plea. Ganger v. Peyton, 379, F. 2d 709 (4 Cir. 1967).

In the instant case, the Solicitor did not at any time engage in plea negotiations directly with the petitioner; he dealt only with court-assigned counsel. And, the trial judge did not participate in the plea discussions. Defense counsel advised petitioner of the alternatives available and of the considerations deemed important by him in reaching an intelligent decision. The decision to enter a plea of guilty was ultimately made by the defendant with full understanding of the consequences. See, ABA Project on Minimum Standards for Criminal Justice, Pleas of Guilty, Part 3 (Tent. Draft Feb. 1967); See generally, The President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society, at 135 (1967).

The burden was upon the petitioner to prove by a preponderance of the evidence that his plea was involuntary. Vanater v. Boles, 377 F. 2d 898 (4 Cir. 1967). This he has failed to do. The Court therefore concludes from the foregoing

findings of fact that petitioner freely, knowingly, and voluntarily entered a plea of guilty to common law robbery.

ASSISTANCE OF COUNSEL

The Court further finds and concludes that petitioner was effectively represented by court-assigned counsel.

Defense counsel would have been derelict in his duty had he not advised petitioner of all the consequences of his plea. "Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered." Von Moltke v. Gillies, 332 U. S. 708, 721, 68 Sup. Ct. 316, 322 (1948); Wilson v. Rose, 366 F. 2d 611 (9 Cir. 1966). Counsel's professional advice to petitioner and his conduct throughout the period of his representation were in every respect correct and proper.

CREDIT

The following appears to be the material facts with respect to petitioner's criminal record:

Date	Court	Offense	Sentence
1960	Northampton County Superior Court	Forgery	5 to 8 years
1960	Hertford County Superior Court	Forgery	5 to 8 years, concurrent with the prior forgery sentence
1960	Hertford County Superior Court (original conviction)	Armed Robbery	18 to 20 years, consecutive to the forgery sentences

5	25 62	Brunswick County Superior Court	Escape	9 months, consecutive to the armed robbery sentence
5	12 65	Mecklenburg County Superior Court	Escape	9 months, consecutive to the prior escape sentence
7	65	Hertford County Superior Court (Retrial)	Common law robbery	8 to 10 years

On March 21, 1964, petitioner completed service of the two forgery sentences and began service of the eighteen to twenty year armed robbery sentence; however, on April 14, 1965 the armed robbery conviction was vacated. Prior to retrial state prison officials determined that petitioner had served actual and gained time of one year, seven months, and seventeen days under the vacated sentence. They applied this time to petitioner's escape sentences and found that there was one month and seventeen days remaining. Therefore, when petitioner was sentenced to a term of eight to ten years upon his conviction of common law robbery, his sentence was administratively reduced to seven years, ten months, and thirteen days to ten years.

Petitioner contends he is entitled to a credit on the maximum as well as the minimum length of his sentence. Respondent claims petitioner has been properly credited with all time to which he is entitled.

Since petitioner has not raised the credit claim in any state court, and since it appears that resort to the North Carolina courts would not be futile, In re Sellers 234 N. C. 648, 68 S. E. 2d 308 (1951); State v. Weaver, 264 N. C. 681, 142 S. E.

2d 633 (1965)[1], the court is of the opinion that appropriate federal-state relations and proper regard for state processes require that the petitioner first be required to present this allegation to the State courts. Giles, et al v. State of Maryland, 386 U. S. 66, 87 Sup. Ct. 793 (1967); Ganger v. Peyton, 379 F. 2d 709, 710-711 (4 Cir. 1967); United States ex rel Roberts v. La Vallee, 373 F. 2d 49 (2 Cir. 1967); Tyler v. Croom, 264 F. Supp. 415 (E.D.N.C. 1967). NOW, THEREFORE,

It is ORDERED that the application for a writ of habeas corpus be and it is hereby denied.

This 5th day of February, 1968.

/s/ Algernon L. Butler
Chief Judge, United States District Court

A True Copy, Teste:

Samuel A. Howard, Clerk

By: Elsie Lee Harris
Deputy Clerk

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1. In *Weaver* the North Carolina Supreme Court held that where a defendant receives the maximum sentence at retrial upon his conviction of a lesser offense, he is entitled to credit for time served under his original conviction. Lassiter received a term of ten years, the maximum prescribed for common law robbery, State v. Stewart, 255 N. C. 571, 122 S. E. 2d 355 (1961); In re Sellers, 234 N. C. 648, 68 S. E. 2d 308 (1951). He has not received full credit on the maximum length of his sentence for time previously served for armed robbery.

Appendix C

NORTH CAROLINA : IN THE SUPERIOR COURT
HERTFORD COUNTY

FEBRUARY TERM 1966

JOHN A. LASSITER, PETITIONER)
VS) Judgment
STATE OF NORTH CAROLINA)
RESPONDENT WARDEN H. B. BAILEY)

THIS CAUSE coming on to be heard and being heard upon the petition filed herein by the petitioner, and Answer filed by Honorable W. H. S. Burgwyn, Jr., Solicitor, and upon evidence offered at this hearing, the hearing having been heard in the courtroom of Hertford County on this 24th day of February, 1966, the same continuing the latter part of the day, and having been continued until 9:30 A.M. o'clock on the 25th day of February, 1966, in order to dictate the findings and conclusions of the Court, upon said hearing the Court finds the following facts:

1. The Petitioner was duly charged upon a due and proper bill of indictment charging the offense of armed robbery and was tried at the April, 1960 term of Superior Court of Hertford County, at which time the petitioner entered a plea of guilty to said offense, not having counsel to represent him at the time, that subsequently the petitioner filed a Petition under the Post Conviction Act requesting a new trial for that he was not represented at the aforesaid April, 1960 trial; that a new trial was granted by the Court after hearing the petition and at the April, 1965 term of Superior Court Mr. L. Frank Burleson, an attorney of Murfreesboro, North Carolina and his partner of the firm of Revelle & Revelle were appointed by the Court to represent the Defendant in said action; that the trial of said matter, in order to enable counsel to prepare and investigate the defense of the petitioner, was continued until July Term, 1965 of said Court.

That at the July, 1965 term of said Court the petitioner plead not guilty to the charge of armed robbery, and counsel for the State and for the defendant proceeded to select a jury; but before the jury was completed it became necessary to recess for the evening and to the following day. That on the following day Petitioner's court appointed counsel, after conferences with said Petitioner, and with the Solicitor representing the State, and inquired of the Solicitor as to whether or not he would, did agree to permit the Petitioner to plead guilty to a lesser offense; whereupon said counsel was informed by the Solicitor that he would permit the Petitioner to plead guilty to the lesser offense of common law robbery; that said Petitioner's counsel advised the Petitioner of this fact and counseled with the Petitioner at length, at times in the presence of members of the said Petitioner's family; that said Petitioner was advised as to the maximum penalty for armed robbery and the maximum penalty for common law robbery, and that said petitioner informed his counsel how many years he, the defendant, would have to serve upon a plea of guilty to the offense of common law robbery and figured up how many years he would have to serve before he would be entitled to a parole, after having been advised by his counsel in the opinion of said counsel, while he could not obtain more than the maximum punishment under the plea of guilty for common law robbery that in the opinion of said counsel, he did not think he would receive less than eight years. That before entering upon the selection of the jury in this matter and before the latter mentioned conference with his counsel, said counsel had conferred with the Petitioner about his case in Charlotte, North Carolina, Williamston, North Carolina and at the jail and in the courthouse in Hertford County; that said counsel had made extensive investigation and research in connection with said case and in connection with matters brought to his attention by the Petitioner, and said counsel diligently explored every possible avenue of defense suggested by said Petitioner, but said counsel, after his investigation,

was very much concerned about the defenses mentioned by his client and that his investigation disclosed they were weak, and he so advised his client.

3. That the Petitioner, after conferring with his counsel, and discussing the various possibilities and the possible dangers confronting the defendant regarding the offense against him, and after consulting with one or more members of the family of petitioner, and after said Petitioner was advised by his counsel that he, the Petitioner, would have to decide for himself as to whether or not he would enter a plea of not guilty as to the charge of armed robbery, or whether or not he desired to enter a plea of guilty to the lesser offense of common law robbery, after which the Petitioner voluntarily and understandably advised his counsel that he desired to enter a plea of guilty to the lesser offense of common law robbery, and that said Petitioner at the time, as he has admitted at this hearing, knew what it meant, knew and understood; what it meant to enter a plea of guilty to said offense, knew and understood the maximum penalty for armed robbery, and the maximum penalty for common law robbery, and the consequences of such a plea of guilty being entered, and that said Petitioner, further admits at this hearing, that at the 1965 term his attorney, Mr. Burleson had his permission to enter his plea of guilty to common law robbery; that the Petitioner stated in this hearing that his main grievance and the basis for his Petition now is that he received what he considered to be an excessive sentence, but he admits in this hearing that he knew at the time that his plea of guilty was entered what the maximum penalty was.

4. That when the Petitioner's plea of guilty to the offense of common law robbery was tendered the court, and accepted by the Solicitor, to the offense of common law robbery the Presiding Judge, the Honorable J. William Copeland, extensively interrogated the Petitioner under oath as to whether or not he understood the nature and consequence of his plea of

guilty, what the court could do, and as to whether or not he was satisfied with his court appointed attorney and with the services of said attorney and whether or not the Petitioner had authorized said attorney to enter the plea of guilty for him as made and whether the Petitioner in his own proper person was entering a plea of guilty to said offense; that prior to said interrogation the Court had instructed the Court Reporter to transcribe the questions and answers made by the Court and by the Petitioner regarding his said plea; that said questions and answers were later transcribed and ordered filed with the Clerk of the Superior Court of this County in the jacket in this case, which questions and anwsers were presented in this hearing marked "State's Exhibit 1", and as follows:

"NORTH CAROLINA — IN THE SUPERIOR COURT
HERTFORD COUNTY — JULY TERM, 1965

No. 793A

STATE OF NORTH CAROLINA

vs

JOHN ARTHUR LASSITER

The defendant was duly sworn.

The matter now to be taken up was taken up out of the presence of the jury and prospective jurors. Messrs. Revelle & Revelle were heretofore appointed to represent the defendant in the trial of his case, the bill of indictment having charged the defendant with the felony of armed robbery. The defendant, through his counsel, tendered to the State a plea of guilty of common law robbery.

COURT: Before the Court can accept this plea it becomes necessary for the Court to ask the defendant certain questions, which I will ask the defendant in just a minute.

You have just tendered a plea of guilty, through your counsel, to the crime of common law robbery. You are charged in the bill of indictment with the crime of armed

robbery. Common law robbery is a lesser offense than armed robbery. Common law robbery is a felony, the maximum punishment for which is ten (10) years in the State Prison. You will note I stated the maximum punishment. That means ten years is the most that the Court could give under that plea. The matter of the punishment will be taken up later, and will depend upon the facts and circumstances of this particular case.

Q. Did you authorize your attorneys to tender this plea of guilty of common law robbery?

A. I did.

Q. How old are you?

A. Thirty years old.

Q. Are any of your family present?

A. Yes, sir.

Q. What members of your family have been present this morning?

A. My wife, my mother and father.

Q. Have you had an opportunity to talk to them and consult with them about this matter?

A. Not all of them.

Q. Who have you talked to?

A. My father.

Q. Do you wish to talk to any other members of your family about this particular matter?

A. Yes, sir.

JOHN ARTHUR LASSITER:

Q. Would you like to do that before you tender a plea of guilty of common law robbery?

A. Yes, sir.

COURT: Let the defendant talk to the members of his family.

Q. Do you wish for your lawyers to be present or do you wish them not to be present when you talk to the other members of your family?

A. I do wish for them to be present.

COURT TO SHERIFF:

The lawyer is to be present at the defendant's request, and let the defendant talk to his father, mother and wife.

The defendant returned to the courtroom with his counsel.

COURT TO DEFENDANT:

Q. Let the defendant stand up. The last question I asked you was whether you had had an opportunity to confer with your mother, father and wife. At that time you stated you had conferred with your father but had not had an opportunity to confer with your mother and your wife, at which time the Court permitted you to do so. Have you now conferred with your mother and your wife in addition to your father?

A. Yes, sir.

Q. At your request your attorneys were present at that time?

A. Yes, sir.

Q. In the course of your conferences with your lawyers have you been promised anything if you entered this plea of guilty?

A. No, sir.

Q. Has the Solicitor for this district promised you anything if you pleaded guilty?

A. No, sir.

Q. Has any law enforcement officer anywhere promised you anything if you pleaded guilty?

A. No, sir.

Q. By anything I mean has anybody promised you any favor or hope of reward or rewards if you would plead guilty?

A. No, sir.

Q. Nobody has told you it would be better if you pleaded guilty?

A. No, sir.

Q. Has anybody threatened you in any way if you did not plead guilty?

A. No, sir.

Q. By "anybody" I refer to your attorneys or anyone else?

A. No, sir.

Q. Has anyone in this present trial told you you had better plead guilty?

A. No, sir.

Q. Where have you been confined recently?

A. Williamston, two months in Union County, and in Washington County near Plymouth for a while.

Q. You have previously indicated you know what the maximum punishment for common law robbery is?

A. Yes, sir.

Q. Now, is this plea of guilty as tendered by you completely free and voluntary on your part, and nobody has promised you anything if you would do it?

A. That is right.

Q. Has your lawyer which this Court appointed for you some several months ago, been satisfactory to you in every way?

A. Yes, sir.

Q. Has he cooperated with you in every way?

A. Yes, sir.

COURT: At this time this entry will go into the Minutes as follows: Based on the examination which the Court has made of the defendant this day in open court, in his own proper person, the Court finds as a fact and conclusion as a matter of law, that the plea of guilt, in this case is free and voluntary on the part of the defendant, and that it was made without hope of any reward or rewards of any kind and that the defendant fully understands the consequences of his plea of guilty, that is to say the maximum punishment which he could receive under such a plea of guilty.

Q. Do you still wish to plead guilty?

A. Yes, sir.

COURT: The defendant now states in open court that he still wishes to plead guilty.

The prosecuting witness C. A. Vinson was not present for this trial as he is a patient in the Veterans' Hospital, Durham, N. C. not as a result of the attempted robbery in this case.

8/23/65 The above transcript is a true and correct copy of all the questions and answers (made by the court and given by the defendant) at the time of his plea of guilty at July Session (1965) Superior Court of Hertford County.

J. William Copeland,
Judge Presiding "

That in Minute Book X at page 514 there appears the following in connection with said case:

763A

State

v. Armed Robbery.

John Arthur Lassiter

Trial of this case is resumed.

The defendant, through his Attorney Mr. L. Frank Ferguson, withdraws his plea of NOT GUILTY and tenders to the State a plea of GUILTY of common law robbery, which plea is accepted by the State.

Based on an examination of the defendant by the Court this date, the Court finds as a fact and concludes as a matter of law that the plea of guilty in this case was made freely and voluntarily on the part of the defendant and that it was made without fear or compulsion from anybody and it was made without hope of reward or rewards of any kind, and that the defendant fully understood the consequences of his plea of guilty, that is to say, the maximum punishment which he could receive under such a plea of guilty, and the defendant now states in open court that he still wishes to plead guilty.

The Court takes notice that the prosecuting witness, Mr. C. A. Vinson, was not present for this trial, as he is a patient in the Veterans' Hospital, Durham, North Carolina, but not as a result of the attempted robbery in this Case.

The defendant was asked if he had anything further to say before judgment was passed, and answered "no".

The defendant was asked if he was still satisfied with the lawyer appointed for him by the Court and he answered "yes".

Judgment of the Court is that the defendant be confined

to the State's Prison for a term of not less than EIGHT (8) years nor more than TEN (10) years which sentence shall commence at expiration of prison sentence now being served.

The Court recommends to the Prison Department that they look into the possibility of placing this defendant under the Work Release Program at and when they are satisfied he is able to return to it, based on his prison record."

That as the hearing upon this Petition commenced, and before any evidence or showing was made by the Petitioner, he stated to the court he desired to take an appeal in this matter; that upon the conclusion of presenting evidence on both sides and without the court having indicated in any manner whatsoever it's findings or decision would be; and without consulting his attorney the Petitioner spoke out, in open court, that he desired to take an appeal; that during the course of this hearing the Petitioner on several occasions interrupted his counsel and the Court and proceeded to attempt to cross-examine witnesses and ask questions in his own proper person; that on at least two occasions the Court inquired of him if he desired to have his court appointed counsel withdraw and to conduct the hearing upon his own, at which time he stated he would prefer retaining his court appointed counsel, but did thereafter continue to interrupt the proceedings with his own questioning.

7. That his previously [illegible] appointed counsel, Mr. I. Frank Burleson, diligently represented the interest of the Petitioner in his trial at the July, 1965 term; that his court appointed attorney in this proceeding, Mr. Carter W. Jones, who has enjoyed an extensive practice, both civil and criminal, for a number of years in the courts of eastern North Carolina, diligently and ably represented the Petitioner in this hearing.

8. The Court further finds as a fact that the Petition in-

this cause in many respects is absolutely without foundation; that as to some of the statements made by the Petitioner under oath either in this hearing or in his interrogation or answers to interrogations of Judge Cogelaiai he perjured himself; that the time, the effort and the expense incident to a hearing upon such matters, in view of what previously transspired at his trial in July, 1965, constitute a travesty and mockery upon justice.

9. The Court further finds that the Petitioner is duly, properly and legally incarcerated, pursuant to a commitment issued out of the Superior Court of Hertford County.

CONCLUSION OF LAW.

1. That the Petitioner has not made any showing of any failure on the part of his court appointed counsel in the trial of July, 1965 that was prejudicial to his interest;

2. That the plea of guilty by the Petitioner at said term of court, to the offense of common law robbery was voluntarily and understandably made by the Petitioner.

3. The Court concludes as a matter of law that the Petitioner was not denied any of his constitutional rights at the July, 1965 term of the Superior Court of Hertford County.

WHEREUPON, it is considered, ordered, decreed and adjudged that the Petitioner's Petition herein be and the same is hereby denied, and he is denied a new trial. It is further ordered, decreed and adjudged that the Petitioner is duly and legally imprisoned pursuant to legal authority, and he is hereby ordered recommitted to the State Prison Department to abide by the orders of the State Prison officials, pursuant to the commitment heretofore issued in this cause.

It is therefore ordered that the Petitioner be furnished a copy of this judgment, and that a copy be furnished to his court appointed attorney, Mr. Carter W. Jones, and that a copy be furnished to Solicitor W. H. S. Burgwyn, Jr., of Wood-

land, N. C. and a copy forwarded by the Clerk of Superior Court to the Director of Prisons, 835 W. Morgan Street, Raleigh, North Carolina.

This the 25th day of February, 1966.

s/Walter W. Cohoon
Judge Presiding

A true copy
A. W. Greene
Clerk, Superior Court